

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

ST. LOUIS HEART AND VASCULAR,
P.C., *et al.*

Plaintiffs,

vs.

SSM HEALTH CARE ST. LOUIS, *et al.*,

Defendants.

Case No. 21SL-CC01275

Division 18

FILED 12-31-2021 JOAN M. GILMER CIRCUIT CLERK ST. LOUIS COUNTY, MO

ORDER AND JUDGMENT

Plaintiffs seek a preliminary injunction requiring Defendant SSM Health Care St. Louis and its affiliated hospitals (the “SSMSL Defendants”) to grant or reinstate Plaintiffs’ adult cardiology clinical privileges for the pendency of this action.¹ On April 28, 2021, this Court stated that it would take the Motion to Dismiss for Lack of Subject Matter Jurisdiction under advisement and rule on it in connection with the Plaintiffs’ request for a preliminary injunction. The Court heard evidence adduced by the parties on April 28, May 11, and May 19, 2021, and the parties submitted stipulated exhibits and deposition designations on June 2, 2021. Having reviewed the pleadings, evidence, submissions, and relevant law, the Court hereby finds and rules as follows:

PROCEDURAL BACKGROUND

On March 19, 2021, Plaintiffs filed their Verified Petition and Motion for Temporary Restraining Order seeking to enjoin Defendant SSMSL from terminating Plaintiffs’ adult cardiology privileges effective April 2, 2021 at 11:59 p.m. Plaintiffs’ Motion for Temporary Restraining Order was called and heard on March 31, 2021, and denied on April 1, 2021. As to Count I (Breach of Implied Covenant of Good Faith and Fair Dealing), the court found that the

¹ Plaintiffs have not filed a separate motion for preliminary injunction, and the current status quo is that Plaintiffs do not hold adult cardiology privileges with the SSMSL Defendants.

Plaintiff was unable to meet their burden of showing a likelihood of success on the merits and irreparable harm as Plaintiffs' acknowledged there is no contract between the parties. As to Count III (Violation of the MMPA)² and Count IV (Antitrust), the Court found that Plaintiffs failed to meet their burden of showing a likelihood of success on the merits and irreparable harm. As to Count II (Tortious Interference), the Court found that Plaintiffs failed to meet their burden of irreparable harm in that Plaintiffs have medical facilities and privileges at other hospitals. As a result of the denial of Plaintiffs' Motion for Temporary Restraining Order, Plaintiffs adult cardiology privileges with SSMSL were terminated effective April 2, 2021 at 11:59 p.m.

By motion dated March 30, 2021, the SSMSL Defendants moved to dismiss the Verified Petition in its entirety. By Order dated April 19, 2021, the Court dismissed Count III, in which Plaintiffs alleged that the SSMSL Defendants violated the MMPA. The Court denied the SSMSL Defendants' motion to dismiss with respect to Counts I, II, and IV.

The Court held three days of evidentiary hearings on the preliminary injunction issues – on April 28, May 11, and May 19, 2021 – at which Plaintiffs presented five witnesses (Dr. Harvey Serota (“Serota”), Dr. Sanjaya Saheta (“Saheta”), Dr. Pradeep Chandra (“Chandra”), Dr. George Kichura (“Kichura”), and Audrey Lamb; and the SSMSL Defendants presented two witnesses, Michael Bowers (“Bowers”) and Dr. John Phelan (“Phelan”). The parties thereafter submitted stipulated exhibits and deposition designations on June 2, 2021. Plaintiffs also seek to submit statements from some of their patients about their preference to be treated by their SLHV cardiologist and the inconvenience of having to travel to a hospital located farther from their home than DePaul Hospital, where Plaintiffs lost their clinical privilege. The SSMSL Defendants oppose

² The Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 – 407.130. As noted below, the Court has since dismissed Plaintiffs' MMPA claim.

the submission of those statements on the grounds that they are not only inadmissible hearsay, but also irrelevant and not verified under oath.

DISCUSSION

I. THE SSMSL DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION.

A. Under the Rule of Non-Review, this Court has Limited Subject Matter Jurisdiction and Limited Equitable Powers.

In this action, Plaintiffs challenge the SSMSL Board's staffing decision to enter into an exclusive provider arrangement for adult cardiology services that closed the staff for adult cardiology services to those cardiologists affiliated with the exclusive provider, resulting in the termination of Plaintiffs' adult cardiology clinical privileges at certain SSMSL hospitals. Plaintiffs now ask the Court to enter a preliminary (and permanent) injunction requiring the SSMSL Defendants to grant or reinstate Plaintiffs' adult cardiology clinical privileges. Accordingly, the Court must first deal with a threshold issue of limited subject matter jurisdiction and its limited equitable powers in such an action. There have been numerous decisions on issues relating to staffing decisions in hospital settings. The court notes that the Defendants have made no allegations that the Plaintiff doctors were not providing quality medical care to their patients and Defendant concedes these doctors are qualified, trained, and otherwise quality medical providers in their field of cardiology.

In *Richardson v. St. John's Mercy Hosp.*, 674 S.W.2d 200 (Mo. Ct. App. 1984), the Missouri Court of Appeals for the Eastern District reversed a trial court's issuance of an injunction permanently enjoining St. John's, a private hospital, from restricting the plaintiff doctor's surgical privileges. In so holding, the appellate court invoked the Rule of Non-Review, which provides that "the exclusion of a physician or surgeon from practicing in a private hospital is a matter which

rests in the discretion of the managing authorities[,]” and held that “the circuit court was without jurisdiction to hear the petition of Dr. Richardson and to enjoin St. John’s.” *Id.* (emphasis added).

In *Egan v. St. Anthony’s Med. Ctr.*, 244 S.W.3d 169, 171 (Mo. 2008) (*Egan I*), the Missouri Supreme Court characterized *Richardson* as “holding that the court had no jurisdiction to review the staffing decisions of a private hospital.” *See also Ralph v. St. Anthony’s Med. Ctr.*, 470 S.W.3d 783, 786 (Mo. Ct. App. 2015) (noting that the court in *Richardson* “fram[ed] the issue as a question of jurisdiction” in dismissing the plaintiff’s tortious interference claim based on the termination of his clinical privileges). In its opinion, the Missouri Supreme Court recognized that hospital staffing decisions are generally not subject to “judicial oversight” and “judicial review,” 244 S.W.3d at 171, but crafted “a limited departure from” the Rule of Non-Review that allows “[j]udicial review of a hospital’s staffing decisions” to enjoin “express and material procedural violations of a hospital’s bylaws[,]” *Adem v. Des Peres Hosp., Inc.*, 515 S.W.3d 810, 815 (Mo. Ct. App. 2017). In *Egan v. St. Anthony’s Med. Ctr.*, 291 S.W.3d 751 (Mo. Ct. App. 2009) (*Egan II*), the Missouri Court of Appeals, on appeal after remand from *Egan I*, held that this “limited form of judicial review is in harmony with courts from other jurisdictions that have expressed a reluctance to substitute their judgment for the superior professional judgment of **hospital officials** in evaluating hospital staff decisions.” 291 S.W.3d at 760 (emphasis added). “The sole exception to the rule of non-review is that a reviewing court may determine whether a hospital complied with the basic **procedural** protections of its bylaws without reviewing the merits of a hospital’s staffing decision.” *Adem*, 515 S.W.3d at 819 (emphasis in original).

Stated differently, in *Egan I*, “the Missouri Supreme Court set out a limited exception to this ‘general rule of non-review’: a doctor may bring a claim in equity for injunctive relief by asking the court to compel a hospital to substantially comply with its bylaws before the hospital

may revoke the physician's privileges.” *Adem*, 515 S.W.3d at 817 (quoting *Egan I*, 244 S.W.3d at 174).³ Accordingly, Missouri courts lack subject matter jurisdiction to ““impose judicial review on the merits of a hospital’s staffing decisions but will act *only* to ensure substantial compliance with the hospital’s bylaws.”” *Adem* at 815-16 (quoting *Egan I*, 244 S.W.3d at 174) (emphasis added). Ultimately, the case law is well established in this jurisdiction that courts ought to give deference in staffing decisions made by hospitals. Because *Adem* and the standards of review in *Egan II* are good law, “medical staff members are not entitled to equitable relief” and the reviewing court “may not reweigh the evidence or interfere with the hospital’s decision on the merits” unless the hospital failed to substantially comply with its bylaws. Therefore, the limited issue for this Court is to determine whether SSMSL substantially complied with the DePaul Hospital Medical Staff Bylaws and Credentials and Hearing and Appellate Review Policy and Procedure Manual (the “Bylaws”) in making the decision to enter into an exclusive arrangement for adult cardiology services and the resulting termination of Plaintiffs’ adult cardiology privileges.

B. SSMSL Substantially Complied with the Bylaws

The Court heard from Bowers, Regional Chief Operating Officer of SSM Health Care St. Louis (371).⁴ In late 2019 or early 2020, Bowers and other SSMSL senior leadership, including Dr. Hsieng Su (“Su”), SSMSL’s Regional Chief Medical Officer who is responsible for quality and safety for all of SSMSL’s ministries, and Dr. Ellie Azarak (“Azarak”), a cardiologist, began focusing on ways to improve SSMSL’s cardiovascular service line (379-380). They testified they

³ Moreover, under *Egan*, Plaintiffs cannot seek damages based on the SSMSL Defendants’ staffing decision. See *Ralph*, 470 S.W.3d at 786 (invoking the Rule of Non-Review to reject plaintiff’s tortious interference claim for damages because the alleged act of interference was the termination of plaintiff’s privileges, a decision whose merits the court lacked jurisdiction to question). If Plaintiffs could show that the SSMSL Defendants failed to substantially comply with the Bylaws before terminating Plaintiffs’ clinical privileges, their only available remedy would be for injunctive relief to require the SSMSL Defendants to substantially comply with the Bylaws. Plaintiffs cannot recover damages based on such a failure or the staffing decision whereby they terminated Plaintiffs’ clinical privileges.

⁴ Unless otherwise noted, all page numbers reference the preliminary injunction hearing transcript.

had three principal concerns with the adult cardiology service line: (1) ensuring enough volume of cases per cardiologist on staff (as there was a correlation of outcomes to the number of cases that providers do. A lower number of procedures per provider may have an inverse relationship to outcomes and quality);⁵ (2) coordinating clinical standardization and utilization of resources; and (3) scheduling resources among a spread-out distribution of hospitals (384-385).

On September 28, 2020, Bowers and Su requested that the SSMSL Board authorize a study to determine whether an exclusive provider arrangement with SSM Medical Group would improve the quality of the adult cardiology service line and increase administrative efficiencies within that service line. (386-389; Exhibit A; 559-561; Exhibit I). The SSMSL Board approved the study (391), and approximately two months later, on November 23, 2020, the study findings, which were prepared by Su, Azarak and Bowers, were presented to the SSMSL Board, whose recommendation was to close the adult cardiology staff and adopt and implement an exclusive provider model (392; 535-544; Exhibits C, D, and E). The SSMSL Board then issued a Board Resolution dated November 23, 2020 authorizing SSMSL to enter into an exclusive provider arrangement with SSM Medical Group and to terminate the staff privileges for those not affiliated with SSM Medical Group.

The SSMSL Board selected SSM Medical Group as the exclusive provider because it was an aligned affiliate of SSMSL and had been part of SSMSL's integrated delivery network for approximately thirty (30) years (375). SSM Medical Group is the in-house provider to SSMSL of an array of clinical services, including cardiology services (377). Through contracts and direct employment, SSM Medical Group provides those services to SSMSL hospitals (377).

⁵ In 2017, the State of Missouri flagged SSM Health DePaul Hospital for having too few cases per cardiologist (385; Exhibit F; 486-487; 546-547; Exhibit C). SLHV, for example, only averaged 3.6 STEMI procedures per cardiologist at DePaul in 2019 (551).

SSM Medical Group and SSMSL are closely connected and the Board never considered establishing a single service provider with the Plaintiffs.

SSM Health's bylaws, section 8.2.3(j), exempts from Adverse Actions whereby a staff physician loses his or her clinical privileges because SSMSL entered into an exclusive provider arrangement for the services covered by those clinical privileges, it satisfies the *Egan* analysis. Plaintiffs' claims for injunction falls on the first part of the test, that an adversely affected member of the medical staff must demonstrate "that the hospital actually violated an express requirement of the bylaws." *Egan II*, at 759. Because the bylaws expressly exempt from Adverse Actions the resultant staffing decisions made upon the hospital entering into an exclusivity agreement with another provider, the hospital did not violate any express requirements it set out in its own bylaws regarding any requirements for a MEC hearing.

The court finds that the SSMSL Board's decision to terminate Plaintiffs' clinical privileges (along with the clinical privileges of approximately 16 other cardiologists who were not affiliated with Plaintiff SLHV) was authorized by Section 8.2.3(j) of the Bylaws (the Credentials Manual), which allows for the automatic (without cause or a hearing before the MEC) termination or discontinuation of clinical privileges covered by an exclusive provider arrangement. Section 8 identifies the types of actions, called "Adverse Actions," taken by the Board where affected staff physicians are entitled to request a hearing before the Medical Executive Committee ("MEC") and the process for those hearings. Section 8.2.3 identifies the types of actions that do not qualify as "Adverse Actions" and thus do not provide for an MEC hearing. Section 8.2.3(j) specifically exempts from Adverse Actions SSMSL hospital actions whereby a staff physician loses his or her clinical privileges because SSMSL entered into an exclusive provider arrangement for the services covered by those clinical privileges:

Denial of appointment or reappointment to, or continued membership and clinical privileges on, the Professional Staff for the sole reason that Health Center previously entered into an exclusive contract or arrangement with another Practitioner, Independent Provider or professional group that covers applicant's requested areas of practice such that initial applicant would have no ability to actually exercise clinical privileges at the Health Center.

(410-411; Exhibit O). Consequently, the Bylaws expressly authorize the termination or discontinuation of clinical privileges because of an exclusive provider arrangement and expressly provides that any affected staff physicians are not entitled to a hearing before the MEC on that staffing decision.

This provision has been in place since 2011 (411-412). It was approved by MEC (414).

After the November 23, 2020 Board Resolution, Bowers, on behalf of SSMSL, approached SSM Medical Group about serving as the exclusive provider of adult cardiology services; SSM Medical Group agreed to do so. (405-407; 418; 531-534; Redacted Exhibit H). Accordingly, by letter dated January 27, 2021, approximately 30 unaffiliated cardiologists, including the 14 plaintiff cardiologists, were informed that their adult cardiology staff privileges would terminate effective April 2, 2021 at 11:59 p.m. (417-418; Exhibit M).⁶

Saheta, who was a designated corporate representative of SLHV, could not identify any specific provision in the Bylaws that supports the allegation that any decision regarding membership and clinical privileges had to have been presented and acted upon by the MECs and medical staffs of SSMSL hospitals (200; Saheta Designated Deposition Testimony, pp. 6; 69-74). Saheta admitted that the MEC acts on behalf of the medical staff and approved the Bylaws which authorized the termination of Plaintiffs' clinical privileges at issue in this case (200), and Saheta testified credibly that he had no knowledge that SSMSL failed to substantially comply with Section

⁶ The original termination date established by the SSMSL Board was March 1, 2021 (Exhibit B). This was extended to April 2, 2021 (419-420; Exhibit G).

8.2.3(j), in making the staffing decision to enter into an exclusive provider arrangement for adult cardiology services and terminate the clinical privileges of staff physicians unaffiliated with the exclusive provider (204-205).

The automatic termination of cardiologists unaffiliated with the exclusive provider, as set forth in the Bylaws, came as no surprise to SLHV because, as Saheta acknowledged, the Bylaws are provided to physicians when they apply [and re-apply] for privileges (201). Pursuant to Section 3.3.5 of the Bylaws (the Credential Manual), each physician acknowledges that he/she has read and is familiar with the bylaws and related manuals, policies and guidelines, and agrees by virtue of his or her appointment of clinical “privileges” to abide by them at all times (203).

The Bylaws provide that SSMSL can terminate Plaintiffs’ clinical privileges if it “previously entered into an exclusive contract *or* arrangement with another ... professional group that covers” the Plaintiffs’ “areas of practice” (emphasis added). Because of the disjunctive “or,” the Bylaws do not require that SSMSL have entered into a formal, fully executed exclusive provider contract before sending the notice letter – an “arrangement” or understanding is sufficient, and even then the key date is the date of termination, not the date that SSMSL provides advance notice of it. The evidence suggests that SSMSL had been in negotiations to enter into a contract with SSM Medical Group as of January 27, 2021, the date SSMSL gave advance notice that Plaintiffs’ clinical privileges would terminate in approximately 60 days (405-407; 418; 531-535; Redacted Exhibit H). The evidence establishes that SSMSL that the formal exclusive provider agreement was executed on April 2, 2021 and Plaintiffs’ clinical privileges terminated at 11:59 p.m. on that date (Redacted Ex. H).

Egan requires only “substantial compliance,” such that hyper technical as opposed to material deviations from the Bylaws are insufficient to sustain an *Egan* claim. Plaintiffs have no viable *Egan* claim based on this purported irregularity.

Based on the foregoing testimony and evidence, the Court finds insufficient support for Plaintiffs’ allegations that SSMSL failed to substantially comply with its Bylaws. The Court finds that SSMSL substantially complied with the Bylaws in entering into an exclusive provider arrangement for adult cardiology services and the resulting termination of Plaintiffs’ (and others’) adult cardiology privileges. Accordingly, under the limited exception to the Rule of Non-Review, which grants this Court subject matter jurisdiction only to ensure substantial compliance with the bylaws and specifically negates subject matter jurisdiction to impose judicial review of the merits of SSMSL’s staffing decision, this Court has now exhausted its limited jurisdiction.⁷ “If a hospital substantially complies with its bylaws, the adversely affected medical staff member is not entitled to equitable relief, and a reviewing court may not reweigh the evidence or interfere with the hospital’s staffing decision on the merits.” *Adem*, 515 S.W.3d at 816 (internal citations and alterations omitted). Accordingly, Defendant SSMSL’s Motion to Dismiss for Lack of Subject Matter Jurisdiction is granted; Plaintiffs’ Motion for Preliminary Injunction is hereby denied; and the case is dismissed with prejudice for lack of further subject matter jurisdiction.

⁷ “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Rule 55.27(g)(3). Accordingly, “[l]ack of subject matter jurisdiction is not subject to waiver; it can be raised at any time, even on appeal, or *sua sponte* by the court.” *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 476 (Mo. banc 2009); *Brady v. Pace*, 108 S.W.3d 54, 61 n. 5 (Mo. Ct. App. 2003) (same); *Groh v. Groh*, 910 S.W.2d 747, 749 (Mo. Ct. App. 1995) (same). “In fact, a court has the duty to *sua sponte* inquire and determine as to whether or not it has [subject matter] jurisdiction.” *In the Interest of D.L.D.*, 701 S.W.2d 152, 156 (Mo. Ct. App. 1985). “Lacking subject matter jurisdiction, the circuit court may take no action other than to exercise its power to dismiss the action.” *Ogle v. Director of Revenue*, 893 S.W.2d 403, 404 (Mo.App.1995) (citing Rule 55.27(g)(3)).

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant SSMSL substantially complied with its bylaws; that no preliminary injunction shall issue; that the Court has exhausted its limited jurisdiction and hereby dismisses this case, with prejudice; and that costs shall be taxed against Plaintiffs.

SO ORDERED

SO ORDERED:



Judge

Division 18

December 31, 2021

Hon. Nellie Ribaud, Circuit Judge, Division 18